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IN THE

Supreme Court of the United States

October Term, 1967

No. 562

ROBERT PUENTES,

Appellant,

v.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 21, TOWN OF BETHPAGE, NASSAU COUNTY, NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the New York State Court of Appeals, dated November 29, 1966, a motion for reargument thereof or in the alternative to amend the remittitur having been thereafter decided on April 11, 1967 by the denial of reargument and the granting of said motion insofar as it sought amendment of the remittitur. Said final judgment affirmed the judgment of the Appellate Division of the Supreme Court, Second Judicial Department, entered on July 19, 1965, which had affirmed the suspension and certain other punishment of Appellant assessed by the Appellee which had found Appellant guilty under § 3012 of the Education Law of the State of New York.

Opinions Below

The decision of the New York Court of Appeals is reported at 18 N.Y. 2d 906, 276 N.Y.S. 2d 638, 223 N.E. 2d 45. The opinions of the Appellate Division of the Supreme Court, Second Judicial Department, are reported at 24 A.D. 2d 628. The administrative decision of Appellee, Board of Education, is unreported. Copies of these opinions are set forth in the Appendix, *infra*, pp. 1, 7, 12.

Jurisdiction

On November 12, 1963, the Board of Education found the appellant guilty of "conduct unbecoming a teacher" and "insubordination" under Section 3012 of the Education Law of the State of New York for writing and circulating a letter to the Board as president of a teachers' union criticizing the action of the Board in not retaining another school teacher and criticizing in general the Board's tenure policy. The Board suspended appellant for seven and one-half months without pay and ordered him to cease and desist from repeating the acts which led to the suspension on pain of dismissal.

This determination was affirmed by the Appellate Division, Second Judicial Department, on July 19, 1965, Mr. Justice Rabin dissenting.

The New York Court of Appeals on November 29, 1966, affirmed by a vote of 4-3, without opinion, the order of the Appellate Division. The three dissenting judges, including the present Chief Judge, voted to reverse and to annul the determination upon the dissenting opinion rendered in the Appellate Division.

Thereafter a motion by the appellant for reargument or in the alternative to amend the remittitur to reflect that a question under the Constitution of the United States

was presented and necessarily passed upon, was decided by the Court of Appeals on April 11, 1967 by the denial of reargument and the granting of the requested amendment of the remittitur. A copy of this Order is set forth in Appendix, *infra*, pp. App. 5-6.

Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of New York, County of Nassau, the court possessed of the record, on July 7, 1967.

Jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. § 1257(2). The following decisions are believed to sustain jurisdiction: *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684 (1959).

Statute Involved

Section 3012 of the Education Law of the State of New York, subdivisions 1 and 2:

> "1. Teachers, principals, supervisors and all other members of the teaching and supervising staff shall be appointed by the board of education of a union free school district having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, upon the recommendation of such superintendent of schools, for a probationary period of three years. The service of a person appointed to any of such positions may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education.
>
> 2. At the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure

those persons who have been found competent, efficient and satisfactory. Such persons, and all others employed in the teaching, examining or supervising service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty. Each person who is not to be recommended for appointment on tenure, shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period."

Question Presented

Appellant, the president of a teachers' union, who was himself a qualified teacher with tenure in the public school system, wrote a letter on behalf of his Union to the Board of Education which was highly critical of the Board's denial of tenure to a certain teacher and of the Board's tenure policy generally. Copies of the letter went to the administrative staff and faculty but no outsiders. After charges and hearing before the Board, appellant was found guilty and punished by suspension without pay and an order to cease and desist in the future on pain of dismissal, for having engaged in "conduct unbecoming a teacher" and "insubordination" under New York State Education Law, Section 3012. The charges did not allege malice, and while there was a Board finding of malice, it did not conform to this Court's standard that the utterance be false and made with knowledge of its falsity or in reckless disregard of whether it be false or true. The question presented is whether the statute as thus applied improperly deprives appellant (a) as a public school teacher,

and (b) in his representative capacity as president of the Union, of fundamental rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Statement of the Case

Appellant is a high school teacher on tenure at the Bethpage Senior High School (A-38, A-39),* Union Free School District No. 21, Bethpage, New York, and the appellee is the Board of Education of the said school district.

Appellant holds a permanent teaching certification issued by the Department of Education in the State of New York in English and all sciences and has taught for more than ten years in Union Free School District No. 21. It is conceded that Mr. Puentes is highly regarded as a superior teacher as is evidenced by the fact that he was in charge of advanced placement chemistry students (A-54, A-162).

Mr. Puentes was and is the President of the Bethpage Federation of Teachers (A-132), an organization of teachers in the Bethpage school system. This labor organization is a local of the American Federation of Teachers, AFL-CIO.

Teachers acquire tenure after a specified number of years of satisfactory teaching and the absence of objective criteria in selecting teachers for tenure adversely affects the morale of teachers to the detriment of the educational system.

This has been a continuing problem in the Bethpage school system and led to a study by the National Educa-

* The symbol "A" refers to the pagination contained in the appendix to Petitioner-Appellant's brief to the New York Court of Appeals which is part of the certified record herein.

tion Association of the system in 1958. There was a follow-up of the said investigation by the National Education Association Commission on Professional Rights and Responsibilities, which resulted in a report entitled "Bethpage Revisited" (Superintendent's Exhibit No. 4). At pages 4 and 5 of the said report, the following appears:

> "The evaluation records of teachers' services and denial of tenure to probationary teachers were important factors in the disturbances existing at the time of the 1956 investigation."

Although this report in reviewing conditions in Bethpage in the school year 1962-3 indicates that the conditions were corrected, the teachers themselves were not satisfied that such was the case, and the Federation's letter, which constituted the sole basis for the charges against Mr. Puentes, made numerous references to this problem of proper and objective evaluation of teachers and particularly the evaluation of one Miss Helen Coelho.

Miss Coelho, a native of India, who had taught in that country and in England, had been hired to teach in the Bethpage school system. After having taught the third grade for two years she was notified that she would not be rehired. The faculty was disturbed by this in that her pupils had shown superior accomplishment, parents had expressed enthusiasm about the results obtained by her pupils and her records appeared to show above average performance.

The Federation was asked to interest itself in her cause (A-61, A-121) and after investigating the situation (A-122, A-123, A-124), it decided to intervene on her behalf even though Miss Coelho was not a member of the organization. The Federation over the signature of Mr. Puentes as President, sent the following letter to appellee on June 18, 1963, addressed to Board member Lee Hilton:

(Letterhead of Bethpage Federation of Teachers, Local 1379, Union Free School District #21, Bethpage, New York.)

"Dear Mr. Hilton:

Although good tactics demand that a person "lead from strength,' we are writing this letter and leading from weakness in the interest of justice to an individual teacher and educational welfare of the children of Bethpage. This letter expresses the strong sentiments of all our members and still more Bethpage teachers who are not members.

We recognize the weakness in the position of a probationary teacher who can be dismissed at whim, but we wonder whether Bethpage can afford to lose the services of a teacher of demonstrated competence and, at the same time, increase the skepticism of a faculty whose respect for the procedures of the district is already dangerously low, as any honest attempt to determine the true level of teacher morale would reveal.

We refer to the issue involving Miss Helen Coelho, third grade teacher at the Pine Avenue School, who has not been requested to return to the district in September. If there were any doubt about her professional qualifications, we would defer to the administrative decision and this letter would not be written. But we are convinced that her departure from the district is due to personal considerations and that she is the victim of her supervisor's whim or a questionable administrative practice. Certainly, her professional record speaks for itself.

Item: Iowa tests show her third grade achieving at the fifth grade level, the highest results of any third grade class at Pine Avenue. Last year, she similarly achieved the highest results of any third grade class, although she taught 'low track' students.

Item: Her observation reports are replete with specific praise for her cooperation, dependability, desire, attention to individuals, conscientiousnesss, interest in children, sincerity, devotion of extra time, understanding, encouragement, and other qualities which, one would think, might make her a

teacher well worth keeping in this district, unless other, political considerations outweigh these factors in the minds of district administrators.

Item: The fact that she has come to us from a rich culture of another national tradition adds depth and perspective to the faculty at large, as well as the faculty of her own school.

Item: The parents of her students have expressed overwhelming delight for what Miss Coelho has done for and with their children.

Item: Miss Coelho commands the respect of her colleagues to such an extent that some who are reluctant to enter any controversy have taken positive action in her behalf. Also, she was professionally recognized as the guest speaker before the Bethpage Teachers Association.

Item: The Superintendent of Schools has conceded that Miss Coelho's relations with the school staff have been excellent, that parents of her pupils have expressed enthusiasm and approval of her efforts, and the children are undoubtedly absorbing the subjects presented.

Item: She is a teacher with unique experiences, having taught in India and England before entering education in Bethpage.

Item: Another elementary school principal has expressed a willingness to accept her as a faculty transfer.

Now, suddenly, it has been discovered by her principal that Miss Coelho is unable to 'stimulate her pupils,' certainly a shabby excuse in the light of all the contrary evidence, and especially when it is common knowledge that the predicament of Miss Coelho is basically another instance of competency being subordinated to the 'divine rights' of administration. Can we wonder why education is languishing when its values are so distorted and when, for contemptible political reasons, a glaring wrong cannot be rectified.

So great is the desire for personal justification that Miss Coelho is not to be permitted to transfer to the faculty of a principal who would welcome her. Rather, her fate is to be hounded out of the district.

Although the community has been mollified by the questionable NEA re-evaluation, the truth is that the majority of your faculty rejects their report. Deny this as you wish, it remains the fact. And when the NEA report claims that 'Board policies have now been established for evaluation and review of a probationary teacher's services,'' the matter of Miss Coelho must expose the hypocrisy of this report to even the newest and most timid member of your staff.

We trust that you will not dismiss this letter as another activity of 'trouble-makers,' by which you conceal the very real problems that exist in Bethpage, the NEA report to the contrary notwithstanding. But, in any event, we dare to hope that some of you may really wonder if all is indeed as well as you have been told.

We dare to hope that a searching and thoroughly objective look into the matter of Miss Coelho will reveal even to you some of the basic problems of the district, the elimination of which will mark the beginning of real education for Bethpage, without the need for sham, jargon, or juggled statistics.

Yours truly,

Robert Puentes, President
Bethpage Federation of
Teachers.''

The distribution of copies of this letter was authorized by the Federation (A-40, A-41) and was confined to the administrative staff and faculty. No copies were distributed to outsiders such as the public, parents, pupils or the press. The distribution by the appellant was done in his capacity as President of the Federation and not as a personal act (A-44).

Shortly thereafter charges were filed against Mr. Puentes under Section 3012 of the Education Law. All of these charges, with the exception of one which was dropped on the Superintendent's own motion, concerned themselves with the foregoing letter or grew out of the writing of the letter (A-162).

Subsequently, appellee issued a decision (Appendix, *infra*, pp. App. 12-42) finding the appellant guilty. The appellant was suspended without pay for over seven months and put on notice that "such similar activity and each of them if they occur will be treated as dismissal offenses by this Board of Education" (Appendix, *infra*, p. App. 41).

In its decision the appellee rejected appellant's contentions that the statements in his letter were protected under the free speech guarantees of the federal and state constitutions (*infra*, p. App. 36). It held that the letter was written with "malice" in that "the language used therein is unnecessarily vitriolic" and also evinced a "generalized malice" (*infra*, p. App. 32).

The Appellate Division by decision and order dated July 19, 1965 confirmed the determination of the appellee with one Justice dissenting on the ground that the letter did not "exceed the bounds of fair comment and criticism on a subject relating to a matter of public interest and concern" (*infra*, p. App. 10). His opinion then went on to cite the cases of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), as controlling. However, the majority, citing the now overruled case of *Adler* v. *Board of Education*, 342 U.S. 485 (1952), rejected appellant's contention that Section 3012 of the Education Law was unconstitutional as applied. The court went on to hold that a public employee's freedom of expression is "subject to the proviso that he shall not impair the administration of the services in which he is engaged . . ."; characterized the letter in question as "intemperate"; and concluded that "it would tend to impair the administration of the school district's services" (*infra*, pp. App. 8-9). No mention was made by the majority, and thus no discussion was had, of the relevance of the *Times* doctrine to public employees in general and school teachers in particular. Also, the fact that appellant was

writing the letter in his representative capacity as union president was totally ignored by the majority.

The New York Court of Appeals on November 29, 1966 affirmed the judgment of the Appellate Division by a vote of 4 to 3, the majority filing no opinion. The dissenting judges (including present Chief Judge Fuld) voted to reverse on the basis of the dissenting opinion rendered in the Appellate Division.

On April 11, 1967 the Court of Appeals denied reargument but amended its remittitur to show that a constitutional question was raised and necessarily passed upon.

A notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of New York, County of Nassau, the court possessed of the record, on July 7, 1967.

The Questions Are Substantial

1. There has been an enormous upsurge in public employment in the United States since World War II which trend in all likelihood will continue.* Concurrently, there has been a tremendous growth of unionization of public employees which has been furthered by President Kennedy's Exec. Order 10988 and various state enactments.**

The right of public employees to speak out on matters of public concern including the terms and conditions of their own employment is plainly a matter of great moment and currency. Cases are arising all over the country where the right of public employees to speak without jeopardizing their job tenure is involved.

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* *cf. Bagley* v. *Washington Township Hospital District*, 55 Cal. Rptr. 401 at 409, 421 P. 2d 409 at 417.

** For example, the recently enacted New York "Taylor Law" (Public Employees' Fair Employment Act, McKinney's Session Law News, Ch. 393, May 10, 1967).

Two such cases have now been filed in this Court. *Pickering* v. *Board of Education*, No. 510, October Term, 1967; and *Watts* v. *Seward School Board*, No. 320, October Term, 1967. The instant case likewise presents the free speech issue raised by these two cases. In addition, it presents the free association issue of the right of public employees to band together in a union and speak out collectively in order to protect their mutual interest.

Thus there is here presented both the question of the right of an individual teacher to criticize his employers who are themselves elected public officials, and the right of public employees to act through their union to speak out on matters of legitimate concern to the group, without risking or suffering disciplinary action.

The ruling by a bare majority of the New York Court of Appeals, affirming Board of Education punishment of a teacher for writing a letter on behalf of his Union to the Board, can effectively emasculate the functioning of a public employees union, vitiate the role of teachers in striving to improve the quality of the educational system of which they are the most crucial segment and formally relegate the public employee to "second class citizenship." For these reasons alone, it is time now for the United States Constitution to apply in all its majesty so as to protect public employees as it does the rest of the citizenry. A declaration that public employees, whether as individuals or in their collective capacity, may exercise their First Amendment rights is long past due.

2. That the letter in question here, the authorship of which represents the sole transgression of the appellant, discussed a matter of public importance—the methods employed by a Board of Education in selecting and retaining school teachers—can not be gainsaid.

It is now crystal clear that such a letter embodying criticism of a public official, relating to his official con-

duct, written by someone other than a public employee, would be constitutionally protected unless it could be faulted as having been knowingly or recklessly false. *New York Times Co.* v. *Sullivan, supra; Garrison* v. *Louisiana, supra; Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). Recently this doctrine was extended to the criticism of "public figures" as well. *Curtis Publishing Co.* v. *Butts* and *The Associated Press* v. *Walker,* 388 U.S. 130 (1967). Very sound fundamental reasons support this right to criticize public officials in the execution of their public trust, and there seems to be no reason in the nature of public employment why *New York Times* v. *Sullivan, supra, should* not be deemed to state the limits a public employee may go towards criticizing supervisory officials without loss of First Amendment protection. Accord, *Swaaley* v. *United States,* 376 F. 2d 857 (U.S. Ct. Cl. May 12, 1967). The notion that this doctrine applies only to the citizen-critic of his government was heard and rejected in *Bond* v. *Floyd,* 385 U.S. 116 (1966), where this Court held the principle of *Times* applicable to statements of a State legislator criticizing public policy and the implementation thereof. "We think the rationale of the New York Times case disposes of the claim that Bond's statements fell outside the range of constitutional protection." *Bond* v. *Floyd, supra,* at 136.

The operating premise of the majorities below apparently is that the appellant has no right to public employment, hence his exercise of constitutionally protected free speech is undertaken at the risk of suspension from employment, or worse, dismissal. This approach may be traced to Mr. Justice Holmes, who while sitting as Chief Justice of Massachusetts seventy-five years ago held:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor, Etc., of City of East Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (1892).

Fortunately, this notion that merely by becoming a public employee an instant transmutation took place whereby the public employee, formerly a citizen, no longer was entitled to a full measure of constitutional protection, has been thoroughly discredited. *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967). Reversals in the instant case and in the contemporary appeals to this Court from *Pickering* v. *Board of Education*, 36 Ill. 2d 568, 225 N.W. 2d 1 (1967) and *Watts* v. *Seward School Board*, 421 P. 2d 586 (Alas. Sup. Ct., 1966) will complete and nail down the patent right of public employees to speak out on matters of public interest especially those relating to their own bailiwick.

The decision herein appealed from cannot be reconciled with the decision of this Court when it said:

> "But constitutional doctrine which has emerged since that decision [referring to *Adler* v. *Board of Education*, 342 U.S. 485 (1952)] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. . . . 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Keyishian* v. *Board of Education, supra* at 605-606.

or when this Court said:

> "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity* v. *State of New Jersey, supra* at 500.

While these principles have only recently been stated so explicitly and compellingly, they are neither new nor novel and prior decisions could well have supported a different result below. See, for example, *Wieman* v. *Updegraff*, 344

U.S. 183 (1952); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964): *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Speiser* v. *Randall*, 357 U.S. 513 (1958).

Moreover, school teachers, above all, must be accorded freedom of thought and expression.

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton* v. *Tucker, supra,* 364 U.S., at 487, 81 S. Ct., at 251. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States* v. *Associated Press, D.C.*, 52 F. Supp. 362, 372." *Keyishian* v. *Board of Regents; supra,* at 603.

Consonant with the necessity of granting school teachers full freedom of speech, which is eloquently yet simply described in the foregoing passage, is the correlative duty of teachers to speak out on matters of public education.

Mr. Justice Rabin, dissenting in the Appellate Division, correctly observed that the letter "reflected nothing more than an expression of the petitioner's opinion concerning a matter upon which he was particularly qualified to speak and as to which he clearly had the right—*if not the obligation*—to voice an opinion, not only individually but in his representative capacity" (Appendix, *infra* p. App. 10). (Emphasis supplied). It was more than coincidence that

this very same notion was reflected in the dissenting opinion of Mr. Justice Schaefer in the *Pickering* case:

> "Teachers are not necessarily the best critics in matters of school finance and administration, but they are in closer contact with the actual operation of the schools than anyone else, and the public should not be deprived of their views." *Pickering* v. *Board of Education,* 36 Ill. 2d 568 at 584.

If this much is established, i.e., that school teachers should and must be protected by the First and Fourteenth Amendments' guarantees of freedom of expression, then inquiry must be made as to how, and if, the constitutional tests consistent with these constitutional guarantees were met in the instant case. Clearly, the rationale of the Supreme Court's rulings in the *Times* case and its brethren requires that discipline, damages, or any repercussion whatsoever stemming from the exercise of criticism of public officials must be preceded by a positive finding that the criticism contains statements that were either knowingly or recklessly false. In capsule, "malice", with the meaning precisely that "the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true" (*Garrison* v. *Louisiana,* 379 U.S. 64, 74), must be found.

This "actual malice" test was never applied by the appellee or by the court on review. Concededly, the appellee found what it considered malice in concluding that whatever qualified privilege appellant possessed as a union president was destroyed by "malice." Its brief discussion is illuminating and worthy of reprint:

> "Even if such privilege existed it would be destroyed by malice. We find that the letter of Puentes dated June 18, 1963 indicates malice in that the language used therein is unnecessarily vitriolic for any legitimate purpose such letter could have.

> Furthermore, while purportedly a letter written in aid and concerning Helen Coelho, the letter goes on to attack both the NEA and the Board of Education in a manner wholely unrelated to the Coelho incident thus disclosing a generalized malice" (*infra*, p. App. 32).

A finding that language was "unnecessarily vitriolic for any legitimate purpose" not only does not satisfy this Court's malice test above described, but also is in direct contradiction to the fundamental premise of the *Times* case, namely, that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan, supra*, at 270. Further, the appellee's finding that the letter disclosed "a generalized malice" because the appellee considered some of its contents not germane to what it considered the thrust of the letter must be characterized at best as an *ipse dixit*.

Yet, this erroneous conception of malice, as found by the appellee, was not discussed by the Appellate Division in affirming appellant's discipline, apparently because that court did not feel constitutional rights were violated in this punishment of a public employee. The Court of Appeals, however, on the occasion of amending the remittitur to reflect the necessity of its having ruled on the constitutional question, held that the appellee's finding that the letter was "malicious . . . was supported by substantial evidence." It appears therefore that the highest court of New York has indeed applied the Constitution to the case at bar but misapplied the constitutional test.

This far-reaching error requires correction by this Court.

3. This case involves more than the chilling effect of appellee's actions on the free speech rights of an individual teacher. A further aspect of great constitutional significance is presented, namely, the free association right of a group of workers, banded together in a union, to advocate and further their collective interests.

It is well settled and should need no further argument that members of a union may, without special statutory authorization by a state, make known the facts of a labor dispute as a right of free communication guaranteed by the First and Fourteenth Amendments of the Federal Constitution. *Senn* v. *Tile Layers Protective Union,* 301 U.S. 468 (1937); *AFL* v. *Swing,* 312 U.S. 321 (1941). So important are these rights of an employee or his labor representative to speak that, absent a clear and present danger of the gravest evil, the state not only is without power to impose a blanket prohibition on their exercise, *Thornhill* v. *Alabama,* 310 U.S. 88 (1940), but also may not place any significant obstacle in their path, *Thomas* v. *Collins,* 323 U.S. 516 (1945). As this Court stated in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 430 (1963), "there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity," and the dissent agreed that freedom of expression "includes * * * his right to advocate and his right to join with his fellows in an effort to make that advocacy effective" (*id.* at 452).

When the Supreme Court declared that "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer . . . is a fundamental right," *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 33 (1937), it made no exception for public employees. The Court's recognition of this right to self organization and representation was based on considerations which are as characteristic of public as of private employment: that a single employee is helpless in dealing with an employer; that he is dependent ordinarily on his daily wage for the maintenance of himself and family and therefore is unable to leave the employ to resist arbitrary and unfair treatment; that a union is essential to give employees opportunity to deal on an equality with their employer.

Thus, the Court has given, time and again, full recognition to the legality of collective action on the part of employees in order to safeguard their proper interests. And at a minimum, collective action includes the right to express the views, needs and desires of the union members. In *Cafeteria Employees Union, Local 302* v. *Angelos*, 320 U.S. 293, 296 (1943), it was tersely expressed: "... a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way ..."

It is in this context that the disciplinary action taken by appellee must be viewed. For the appellant was writing the letter not merely as an individual, whose rights have generous scope in any event, but in his representative capacity as well—as the chief officer of the Bethpage Federation of Teachers. Thus, it may be said that the inhibitory effect of the appellee's action is much greater in breadth and scope than it may seem at first blush and consequently far more damaging to freedoms that are all too delicate and vulnerable, as well as precious, to begin with. For it cannot be disputed that any interference with the freedom of a labor organization is simultaneously an interference with the freedom of all its members.

CONCLUSION

For the reasons stated, appellant respectfully submits that this case presents substantial federal questions of the scope of First and Fourteenth Amendments protection of a public employee/union president criticism of elected public officials who also happen to be his employer. Consideration and resolution of these questions warrant that probable jurisdiction should be noted.

Respectfully submitted,

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